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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HON. JOHN F. GRADY, *et al.*,
Petitioners,

v.

RHÔNE-POULENC RORER INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly exercised its discretion in reviewing, on mandamus, the certification of a nationwide "issue" class where the court held, on the unique facts of this case, that (a) the certification decision amounted to a judicial usurpation of power, and (b) defendants lacked adequate alternative means to obtain relief.

2. Whether the court of appeals properly ordered the decertification of a nationwide issue class where the district court proposed to—

(a) "have a jury determine the negligence of the defendants under" a putatively uniform national legal standard "that does not actually exist anywhere in the world," Pet. App. 12a-13a, and

(b) try the issues of "negligence" and "foreseeability" on a classwide basis before one jury and then the overlapping issues of comparative negligence and proximate causation in individual trials before hundreds of other juries around the country?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Rhône-Poulenc Rorer Inc., Armour Pharmaceutical Company, Miles Inc., Baxter Healthcare Corporation, and Alpha Therapeutic Corporation respectfully request that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Seventh Circuit.[1]

[1] The following disclosure is provided pursuant to Rule 29.1 of this Court:

The parent corporation of Rhône-Poulenc Rorer Inc. is Rhône-Poulenc S.A. Osteosa Corporation is a subsidiary of Rhône-Poulenc Rorer Inc.

The parent company of Armour Pharmaceutical Company is Rhône-Poulenc Rorer International (Holdings) Inc. All subsidiaries of Armour Pharmaceutical Company are wholly owned.

The parent company of Miles Inc. (recently renamed Bayer Corporation) is Bayer AG. Bayer Corporation owns a 28.3% interest in Schein Pharmaceutical, Inc.

The parent company of Baxter Healthcare Corporation is Baxter International, Inc. All subsidiaries of Baxter Healthcare Corporation are wholly owned.

The parent company of Alpha Therapeutic Corporation is Green Cross Corporation of America. Grupo Grifols, S.A. and Alpha Grifols, S.A. are subsidiaries of Alpha Therapeutic Corporation.

STATEMENT OF THE CASE

Respondents filed this mandamus action to challenge an unconstitutional district court plan for trying AIDS-related multidistrict and multistate litigation because the outcome of the proposed class trial would be effectively unappealable. Relying on Rule 23(c)(4)(A), the district court certified a nationwide "issue" class of thousands of hemophiliacs for the purpose of determining whether respondents—who process blood derivatives used to treat hemophilia [2]—were "guilty" of "ordinary negligence" under a purportedly uniform nationwide negligence standard. Pet. App. 60a. The proposed class trial would not determine whether respondents were liable to any petitioner or absent class member. Rather, it would produce a voluminous special verdict form, which the district court hoped could be used by plaintiffs in hundreds—perhaps thousands—of individual trials in federal and state courts around the country. Pet. App. 57a-60a.

The court of appeals issued a writ of mandamus directing the district court to vacate its class certification order. The Seventh Circuit specifically recognized that "mandamus is issued only in extraordinary cases" when (1) an order "so far exceeds the proper bounds of judicial discretion as to be legitimately considered usurpative in character," and (2) the order cannot be effectively reviewed at the end of the case. Pet. App. at 2a-3a, citing *Kerr v. United States District Court*, 426 U.S. 394 (1976); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (per curiam).

This case met that rigorous and plainly correct two-part test. Pet. App. 2a-3a, 11a-12a. The court of appeals held, *inter alia*, that: (1) the district court overstepped its authority by certifying an issue class in viola-

[2] Respondents Armour Pharmaceutical Company, Miles Inc., Baxter Healthcare Corporation, and Alpha Therapeutic Corporation process blood factor concentrates. Respondent Rhône-Poulenc Rorer Inc. is the second-tier parent corporation of Armour.

tion of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and the Seventh Amendment, Pet. App. 17; and (2) the certification "order could not be *effectively* reviewable at the end of the case." Pet. App. 2a (original emphasis). As shown below, the district court's "extraordinary" response to the unique circumstances of this particular litigation led the court of appeals properly to grant the "extraordinary" remedy of mandamus.

1. Hemophilia is an incurable, hereditary disorder characterized by deficiencies of certain clotting factors in the blood.[3] Until the 1960s, the only treatment for hemophilia was transfusion of whole human blood or plasma. In the late 1960s and early 1970s, freeze-dried and concentrated forms of the missing clotting factors were developed and largely replaced the cumbersome and less effective therapies that had previously been used. Life improved significantly for persons with hemophilia; blood factor concentrates made possible "the return to a full range of activities for many patients who were previously wheelchair-bound."[4]

The first cases of the disease now known as Acquired Immune Deficiency Syndrome (AIDS) were reported in homosexual males in June and July of 1981.[5] The cause of the syndrome was unknown. At first, AIDS was reported only in certain groups, namely homosexual males with multiple partners, intravenous drug users, and recent

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[3] Individuals with deficiencies of clotting "Factor VIII" have Hemophilia A. Individuals with deficiencies of "Factor IX"—a different blood protein—have Hemophilia B.

[4] Leon W. Hoyer, *Medical Progress: Hemophilia A*, 330 New Eng. J. Med. 38, 42 (Jan. 6, 1994). Copies of all articles cited by respondents have been lodged with the Clerk of the Court.

[5] Centers for Disease Control & Prevention, U.S. Dep't of Health and Human Services ("CDC"), *Pneumocystis Pneumonia—Los Angeles*, 30 Morbidity and Mortality Weekly Report ("MMWR") 250-52 (June 5, 1981); CDC, *Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men—New York City and California*, 30 MMWR 305-08 (July 4, 1981).

immigrants from Haiti. *See generally Kozup v. Georgetown Univ.*, 663 F. Supp. 1048 (D.D.C. 1987), *aff'd in part and vacated in part*, 851 F.2d 437 (D.C. Cir. 1988). However, in July of 1982, three cases of the rare pneumonia associated with this new syndrome were reported in persons with hemophilia.[6] Additional cases were reported in 1983. In 1984, the medical community reached a consensus that AIDS was transmissible by blood. *Kozup*, 663 F. Supp. at 1052; *Jaime v. Saint Joseph Hosp. Found.*, 853 S.W.2d 604, 611 (Tex. Ct. App. 1993).

The human immunodeficiency retrovirus (HIV) was not identified as the cause of AIDS until the spring of 1984.[7] In March of 1985, the FDA licensed a test to detect antibodies to HIV in blood. All plasma donations collected after the test became available were tested and HIV positive donors were excluded. *See Kozup*, 663 F. Supp. at 1052-53.

By using the new HIV antibody test on stored serum samples, epidemiologists have determined that "62-89% of the U.S. hemophilia A patients who were treated with factor VIII concentrate, and who eventually seroconverted [became HIV-infected], did so prior to January 1983."[8] Thus, before anyone knew that AIDS was transmissible by blood, a large proportion of American hemophiliacs already were infected with HIV.

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[6] CDC, *Pneumocystis carinii Pneumonia Among Persons with Hemophilia A*, 31 MMWR 365-67 (July 16, 1982).

[7] Later that year, experiments by the CDC demonstrated that HIV could be inactivated by heat-treatment processes that had recently been approved for certain blood factor concentrates. In the fall of 1984, the National Hemophilia Foundation's Advisory Committee recommended that physicians strongly consider placing all hemophiliacs on heat-treated concentrates. National Hemophilia Foundation, *Hemophilia Information Exchange*, Medical Bulletin No. 15 (Oct. 13, 1984).

[8] Barbara L. Kroner, *et al.*, *HIV-1 Infection Incidence Among Persons with Hemophilia in the United States and Western Europe, 1978-1990*, 7 Journ. Acquired Immune Deficiency Syndrome 279-86 (Nov. 3, 1994).

2. Approximately 300 lawsuits involving some 400 named plaintiffs have been filed by American hemophiliacs who claim to have been infected with HIV through the plasma-based therapies used to control their hemophilia.[9] Respondents include four of the several providers of the two types of plasma derivatives used in such therapy. Approximately 60 percent of the cases are pending in various state courts. The federal cases have been consolidated for pretrial purposes in the Northern District of Illinois. *In re "Factor VIII or IX Concentrate Blood Products" Prod. Liab. Litig. (MDL No. 986)*, 853 F. Supp. 454 (J.P.M.L. 1993). *See generally* 28 U.S.C. § 1407.

The petition arises from *Wadleigh v. Rhône-Poulenc Rorer*, No. 93 C 5969 (N.D. Ill.)—a purported nationwide class action initiated by a consortium of plaintiffs' counsel against respondents and the National Hemophilia Foundation ("NHF"). Petitioners asserted a wide range of claims against respondents, including at least ten theories based on negligence. Resp. App. 1a-3a.[10] Petitioners argued that, although most hemophiliacs who have been infected with HIV were exposed before that retrovirus was identified and before there was any consensus in the medical community that AIDS could be transmitted through blood products, respondents were nevertheless negligent because they (a) knew that a form of hepatitis could be transmitted through factor concentrates and (b) therefore had a legal duty to protect against transmission of any virus—known or unknown—including the unheard of retrovirus, HIV. Pet. App. 6a. This is sometimes called the "serendipity" theory. *See, e.g., Jaime*, 853 S.W.2d at 614.

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[9] Approximately two-thirds of those cases were filed by class counsel *after* the filing of this purported class action.

[10] Petitioners' other claims included strict product liability, breach of implied warranty, and concert of action by respondents and breach of fiduciary duty by the National Hemophilia Foundation. Pet. App. 36a-37a.

The district court denied petitioners' motion to certify a nationwide class pursuant to Federal Rule of Civil Procedure 23(b)(3). Pet. App. 49a-50a, 52a-53a, 60a-61a. The court concluded, *inter alia*, that petitioners' negligence claims could not be certified because common issues of fact and law did not predominate "[o]n the proximate cause isue." Pet. App. 52a.

The district court announced, however, that it would certify a class pursuant to Rule 23(c)(4)(A) for the purpose of determining whether the respondents were "guilty of ordinary negligence." Pet. App. 60a. The court stated that the "negligence" issue could be decided on a nationwide basis because it "believed" that "the definition of ordinary negligence is substantially identical in all jurisdictions." Pet. App. 56a.

The district court explained that it would develop a special verdict form in an attempt to obtain specific findings on a wide range of theories submitted by petitioners. Pet. App. 57a-59a. That verdict form would likely contain hundreds of interrogatories. Pet. App. 57a-59a. The jury would not, however, be charged under the particular negligence law of each state.

The proposed class trial would not produce a final appealable judgment because the trial would not determine whether respondents were liable to any petitioner or absent class member. Pet. App. 59a, 166a, 19a-20a. Rather, the district court contemplated that, after the class trial, class members would be able to initiate entirely *new lawsuits* in state and federal courts around the country in order to take advantage of any trial findings in favor of the class. Those federal cases already on file would be returned to the district courts in which they originated for separate liability trials before separate juries. Pet. App. 59a, 19a.

The local trial courts would decide, *inter alia*, questions regarding the statute of limitations, causation-in-fact,[11]

[11] Many persons with AIDS and hemophilia have been exposed to risk factors for AIDS other than factor concentrates. These

and proximate cause. They would also be required to try any causes of action that were not included in the class trial; these potentially include additional negligence claims (*see infra*, note 13), as well as any strict liability, warranty, and other causes of action, including cross claims between the respondents. The local trial courts would also have to try in their entirety claims against physicians, hospitals, blood processors, and others who are not parties to the class proceedings, including the "negligence" of these "new" defendants. Finally, they would be required to determine the comparative negligence (or assumption of risk) of each plaintiff and the proportionate fault of each tortfeasor. Pet. App. 59a, 52a, 19a-20a; Resp. App. 10a-11a, 14a-16a.

Respondents moved for reconsideration of the issue class certification decision, arguing, *inter alia*, that it violated the *Erie* doctrine and the Seventh Amendment, that the proposed class trial did not constitute a superior means of resolving this litigation as required by Rule 23, and that the trial would produce an unconstitutional advisory verdict. The district court summarily denied respondents' motion for reconsideration. Pet. App. 63a. The district court also refused to certify its decision for immediate appeal pursuant to 28 U.S.C. § 1292(b).[12] On November 3, 1994, the court formally entered its order of class certification. Pet. App. 31a-33a.[13]

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risk factors include other blood therapies used to treat hemophilia. *See, e.g.*, CDC, HIV/AIDS Surveillance Report at 14 (July 1993) (over 31% of adults and adolescents with AIDS and hemophilia had one or more additional risk factors).

[12] During argument of respondents' motion for § 1292(b) certification, petitioners' counsel of record urged that mandamus was the appropriate vehicle for any challenge to the class certification order. Resp. App. 6a.

[13] The district court denied respondents' motion to amend the class certification order to confirm that all negligence claims against respondents would be tried in the class trial or otherwise would be barred. Resp. App. 9a. The court stated that consideration of negligence issues applicable to only a few class members

3. On December 19, 1994, respondents filed a petition for a writ of mandamus in the United States Court of Appeals for the Seventh Circuit. The petition was fully briefed and argued on January 30, 1995.

On the following day, using a procedure that the Seventh Circuit described as "irregular," Pet. App. 8a, petitioners asked the district court to state its views regarding the appealability of the class trial verdict. In a responsive letter that petitioners subsequently "filed" with the court of appeals, the district court explained (for the first time) that, if the class trial produced findings favorable to petitioners, the court then intended to try the individual claims of one or more of the class representatives. The court acknowledged that "[s]eparate juries would be required" for the class and individual trial and opined that the individual trial would not produce a final judgment, but expressed "hope" that an interlocutory appeal would be allowed. Pet. App. 166a-67a.

The court of appeals issued a writ of mandamus directing the district court to vacate its class certification order. The court of appeals expressly stated that mandamus is an extraordinary remedy available only in those cases in which two conditions are met:

> The first is that the challenged order not be *effectively* reviewable at the end of the case—in other words, that it inflict *irreparable* harm. . . . Second, the order must so far exceed the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous.

Pet. App. 2a-3a (original emphasis).

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would cause the trial to "degenerate" into a "multiplicity of individual trials." Resp. App. 11a-12a. The court therefore decided to leave disposition of such issues to the local trial courts. Resp. App. 15a.

The court of appeals went on to hold that both requirements for issuance of mandamus had been met here. The district court had "far exceed[ed] the proper bounds of judicial discretion" in three ways. First, the district court "propose[d] to have the jury determine the negligence of the defendants" pursuant to "a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia." Pet. App. 12a-13a. This approach was foreclosed by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Pet. App. 13a-18a.[14]

Second, the district court planned to try, on a class-wide basis, "negligence" issues that were inextricably interwoven with proximate cause, comparative negligence and other issues that would be addressed in the individual local trials. Pet. App. 19a-20a. This trial plan violated the Seventh Amendment. Pet. App. 21a. The court of appeals observed that, when mandamus is used to vindicate Seventh Amendment rights, "the stringent conditions on the availability of the writ (including the requirement of proving irreparable harm) [are] excused." Pet. App. 20a-21a.

Third, the district court violated Federal Rule of Civil Procedure 23 by certifying a class when class litiga-

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[14] The *Erie* error posed a particular problem because of the "serendipity" theory on which petitioners base much of their case:

> If the instruction on negligence will serve to instruct the jury on the legal standard of every state of the United States applicable to [petitioners'] novel [serendipity] claim, implying that the claim despite its controversiality would be decided identically in all 50 states and the District of Columbia, one wonders what the Supreme Court thought it was doing in the *Erie* case when it held that it was *unconstitutional* for federal courts in diversity cases to apply general common law rather than the common law of the state whose law would apply if the case were being tried in state rather than federal court.

Pet. App. 14a (original emphasis).

tion was a manifestly inferior means for fair and efficient adjudication of these claims. The court held that in this case, unlike most class actions, trial of individual cases was feasible. Pet. App. 12a-13a. Nevertheless, the district court intended to supplant this "pooling of judgment, of many different tribunals," with a single trial in which the jury would be charged under "a legal standard that does not actually exist anywhere in the world." Pet. App. 12a-13a. The court of appeals held that use of the procedural mechanism of class certification to increase the stakes of the litigation "need not be tolerated" in the circumstances of this case.[15] Pet. App. 12a-13a.

The court of appeals also held that the district court's errors were insulated from meaningful appellate review. Pet. App. 7a, 11a. The Seventh Circuit *assumed*, albeit incorrectly (*see infra*, at 19-20), that the district court's plan of trying the claim of one petitioner to judgment would eventually produce a final judgment. Pet. App. 8a, 166a. The court of appeals held that respondents would be irreparably injured because the certification order—which contained manifest legal errors and improperly heightened "the sheer *magnitude* of the [litiga-

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[15] The court of appeals expressly stated that it was not passing on the merits of the case. Pet. App. 16a. But the court did consider the history of this litigation—including the fact that respondents had won 12 of 13 cases tried thus far. Since the Seventh Circuit decision, respondents' record has changed to 11 wins in 11 fully tried cases. The Eleventh Circuit reversed and remanded for a new trial the sole plaintiff's verdict. *See Christopher v. Cutter Lab.*, 53 F.3d 1184 (11th Cir. 1995). In addition, the Seventh Circuit reversed the defense verdict in *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638 (7th Cir. 1995), and remanded the case for a new trial. Contrary to petitioners' suggestion, Pet. at 27 n.27, the *Gruca* reversal does not reflect favorably on the merits of petitioners' case. The *Gruca* panel ordered a new trial because the district court had failed to (1) rule on a key evidentiary issue, and (2) correct an error in closing argument. Significantly, *Gruca* was authored by Judge Bauer, who joined the majority opinion in the present case.

tion] risk"—would improperly force respondents to settle. Pet. App. 9a-11a.[16]

REASONS FOR DENYING THE PETITION

As the court of appeals recognized, mandamus is an "extraordinary" remedy available "only in extraordinary cases." Pet. App. 2a. This is such a case, which, by itself, argues vigorously against certiorari. The certification order entered by the district court was replete with fundamental constitutional errors. It violated *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). It violated the Seventh Amendment. *See Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931).

The court of appeals analyzed respondents' application for a writ of mandamus pursuant to this Court's rigorous and settled two-part test for issuance of the writ and concluded that (1) the order of the district court amounted to a usurpation of judicial power and (2) the order was insulated from effective appellate review. Pet. App. 2a-3a, 11a-12a. Those two determinations were fully sufficient for issuance of mandamus under this Court's precedents. Neither this Court, nor any of the courts of appeals, has adopted the position urged by petitioners—that the "safety valve" of mandamus is wholly unavailable to correct egregious and unappealable errors in class certification orders. *Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir. 1988).

Moreover, the court of appeals' application of this Court's test for mandamus was correct in the unique circumstances of this case and is carefully limited to its facts. It therefore is unlikely to affect other litigation. For all of these reasons, the petition for a writ of certiorari should be denied.

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[16] The dissent did not dispute the majority's conclusion that the district court had overstepped its authority, Pet. App. 29a, but would not have corrected the district court's manifest errors on mandamus.

1. Petitioners concede (Pet. 14) that this Court has never held that mandamus is unavailable to challenge class certification decisions. They nevertheless argue that this Court's mandamus precedents bar use of the writ to challenge class certification orders. Petitioners are simply wrong.

The Court has never catalogued the types of orders that may be subject to mandamus.[17] Rather, to assure that the writ is applied only as an extraordinary remedy, the Court has established a two-part test that is applied to the facts of each case. Under this test, litigants must first "demonstrate a 'clear abuse of discretion,' or conduct amounting to 'usurpation of [the judicial] power.'" *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989) (citations omitted). *Accord Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976); *Kerr v. United States District Court*, 426 U.S. 394, 402-03 (1976); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964); *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945). In addition, litigants must show that they "lack *adequate* alternative means to obtain the relief they seek." *Mallard*, 490 U.S. at 309 (emphasis added); *Kerr*, 426 U.S. at 403.

The court of appeals applied that two-part test to the facts of this case. The Seventh Circuit stated that mandamus will only issue when the district court order (a) "so far exceed[s] the proper bounds of judicial discretion as to be legitimately considered usurpative in character," Pet. App. 3a, and (b) may "not be *effectively* reviewable at the end of the case . . . ." Pet. App. 2a-3a. Further, the court of appeals stressed the limited availability of

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[17] Indeed, to do so would be inconsistent with the flexible grant of authority in the All Writs Act, which provides that courts of appeals may issue a writ of mandamus when "necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a).

mandamus and the importance of restricting use of the writ to cases that require an "extraordinary" remedy. Pet. App. 2a-4a. It would be difficult to be more faithful to this Court's mandamus standards. The Seventh Circuit's application of those standards to the extraordinary circumstances of this case is factbound and does not merit review.

a. Petitioners contend (Pet. 14) that the decision of the court of appeals conflicts with *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). *Coopers & Lybrand* was not, however, a mandamus case. Rather, the Court held that class certification orders are not appealable as of right pursuant to 28 U.S.C. § 1291. The Court did not address—let alone foreclose—the use of mandamus as an alternative means of challenging usurpative class certification orders. As the court of appeals observed in this case, "[t]he point of cases like *Coopers & Lybrand* is that irreparable harm is not enough to make class certification orders *automatically* appealable under 28 U.S.C. § 1291, not that mandamus is never appropriate in a class certification setting." Pet. App. 3a.

b. Petitioners next contend (Pet. 13, 19) that, because a district court judge has the authority to certify a class under Rule 23, a ruling on class certification cannot constitute a usurpation of judicial power. Pet. 13, 19. Petitioners cite no authority in support of their circular theory. To the contrary, the Court repeatedly has approved the use of mandamus when district courts have invoked federal statutes and rules of procedure to justify the entry of usurpative orders. *See, e.g., Mallard v. United States District Court*, 490 U.S. 296 (1989) (district court had authority under 28 U.S.C. § 1915(d) to request an attorney to represent indigent litigant but overstepped its authority by ordering mandatory appointment of counsel); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (district court had authority to remand case under 28 U.S.C. § 1447(d) but exceeded

its power in remanding case on grounds not authorized under statute); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (district court had authority under Fed. R. Civ. P. 35 to require a physical and mental examination, but it was usurpation of power where court failed carefully to apply Rule 35 guidelines); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (district court had authority under Fed. R. Civ. P. 42(b) and 57 to order jury trial but its use of discretion to deprive defendant of jury trial could not be justified); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) (same); *Hoffman v. Blaski*, 363 U.S. 335 (1960) (district court had power under 28 U.S.C. § 1404(a) to transfer case to different district, but it did not have authority to transfer case to a venue where plaintiff did not have a right to bring it); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (district court had authority under Fed. R. Civ. P. 53(b) to refer cases for trial before a master but it was an abuse of judge's power under the circumstances posed there).

Similarly, petitioners argue (Pet. 13) that mandamus is not available because class certification orders are conditional and subject to modification pursuant to Rule 23(d). However, no court has foreclosed the use of mandamus on this ground. Indeed, there is abundant authority to the contrary. *See infra*, note 25.[18]

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[18] At most, courts consider the *express* willingness of a district court to revisit the certification decision as a factor militating against issuance of the writ in that particular case. *See, e.g., In re Breast Implant Litig.*, No. 92-3420/346 (6th Cir. May 22, 1992) (Pet. App. 198a) (denying mandamus because record established the conditional nature of the certification order in *Dante v. Dow Corning Corp.*, 143 F.R.D. 136, 138 (S.D. Ohio 1992)). In this case, however, the district court showed no inclination to revisit its certification decision. The district court stated that it was inclined to deny respondents' motion for reconsideration before reading their brief and therefore did not require petitioners to file a response, Resp. App. 5a-6a; refused to certify its class certification order for interlocutory appeal, Pet. App. 63a; barred most discovery unrelated to the negligence issue class trial—including

c. At bottom, petitioners argue (Pet. 19) that the court of appeals erred in applying the two-part mandamus test to the particular facts of this case. This claim does not provide a basis for a grant of certiorari. The decision of the court of appeals was correct and, in any event, was limited to the unique circumstances here.

The court of appeals properly held—and the dissent did not dispute—that respondents satisfied the first requirement for issuance of a writ of mandamus: They demonstrated that the district court order "so far exceeded[ed] the proper bounds of judicial discretion as to be legitimately considered usurpative in character." Pet. App. 3a.[10] The court identified three ways in which the district court usurped judicial power and alluded to others which it did not find it necessary to reach. *See* Pet. App. 22a. Petitioners dismiss these "concerns" as "wholly lacking in substance." Pet. 17 n.16. But they are simply wrong.

First, the district court usurped the authority of the states to establish their own common law by "propos[ing] to have a jury determine the negligence of the defendants under a legal standard that does not actually exist any-

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discovery into the claims of the putative class representatives; scheduled the class issue trial within 10 months of entry of its certification order; expressed a disinclination to entertain dispositive motions prior to trial; and even declined to stay issuance of class notice pending disposition of respondents' mandamus petition. Respondents were required to seek a stay from the court of appeals. In short, there was nothing conditional about the certification order here.

[19] Four other courts have recognized that the issues presented in these cases are not proper subjects for class treatment. *See D.K. v. Armour Pharmaceutical Co.*, No. L-8154-93 (N.J. Super. Ct. June 9, 1994); *Gannon v. Cutter Lab.*, No. C-85-20078 (N.D. Cal. April 11, 1988); *Doe v. Cutter Biological, Inc.*, No. 87-0232 (D. Hawaii Dec. 8, 1987); *Doe v. Sno-Isle Community Blood Bank*, No. 86-2-16308-5 (Wash. Super. Ct. June 29, 1987). Copies of these opinions have been lodged with the Clerk of the Court.

where in the world." Pet. App. 13a. The district court's approach does violence to the core teaching of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Petitioners argue only that "[n]ational class actions in diversity cases of the kind contemplated by the district court in the instant case are now common in the federal system." Pet. 17 n.16, 28 n.29. However, they do not cite—and cannot cite—any authority for the proposition that differences in state law can be ignored in trying such cases. Here, petitioners encouraged the district court to adopt a one-size-fits-all approach to negligence law—even though their "serendipity" theory had already been rejected by courts applying the law of several states.[20] Such an approach simply cannot be reconciled with *Erie*'s command to focus pointedly on the law of each state as the rule of decision.

Second, the district court usurped respondents' Seventh Amendment rights by ordering the trial, on a classwide basis, of issues that are inextricably interwoven with issues that would be addressed in subsequent individual trials. Pet. App. 19a-20a. Petitioners assert (Pet. 17 n.16, 28 n.29) only that "well-settled procedures" allow "bifurcation with separate juries" and that any determination on this issue was premature. They ignore the fact that the district court explicitly and repeatedly stated that the issue class negligence trial would be conducted before one jury and that all remaining issues—including proximate causation and comparative negligence—would be tried before numerous other juries. Pet. App. 57a, 59a-60a, 166a. That plan violates the Seventh Amendment.

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[20] *See McKee v. Cutter Lab., Inc.*, 866 F.2d 219, 224 (6th Cir. 1989) (rejecting proposition that respondents had a duty to foresee AIDS epidemic under Kentucky law); *Jones v. Miles Lab.*, 887 F.2d 1576, 1582 (11th Cir. 1989) (hindsight cannot determine fault for spread of AIDS); *Hoemke v. New York Blood Ctr.*, 912 F.2d 550, 553 (2d Cir. 1990) (affirming direction of verdict against plaintiff under New York law). *Cf. Jaime v. Saint Joseph Hosp. Found.*, 853 S.W.2d 604, 614-15 (Tex. Ct. App. 1993) (affirming entry of summary judgment against plaintiff on ground that plaintiff's theory is based on hindsight).

See Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931).[21]

Indeed, as the Seventh Circuit noted, "[t]he protection of the right conferred by the Seventh Amendment to trial by jury in federal civil cases is a traditional office of the writ of mandamus." Pet. App. 31a. This Court has on several occasions endorsed the use of mandamus to block similar Seventh Amendment violations. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). In those decisions, the Court has not required a separate showing that a violation of the right to trial by jury constitutes an injury that cannot be remedied on appeal. *Beacon Theatres*, 359 U.S. at 510-11; *Dairy Queen*, 369 U.S. at 472. *See generally* Pet. App. 21a. Thus, on the basis of the district court's Seventh Amendment error alone, mandamus properly issued.

Third, the district court engaged in a gross abuse of discretion by certifying an issue class although class litigation would be a manifestly inferior means of adjudicating these cases. *See* Fed. R. Civ. P. 23(b). Pet. App. 12a-13a. Specifically, the court of appeals concluded that the district court overstepped its authority by placing the outcome of this litigation in the hands of a single class jury when individual trials not only are feasible, but will permit "a pooling of judgment, of many different tribunals."

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[21] The Seventh Amendment plainly forbids the splitting of different parts of a controversy for resolution by separate federal court juries where the issues are interwoven. *See Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) ("inherent in the Seventh Amendment . . . is the general right of a litigant to have only one jury pass on a common issue of fact"). *See also McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir. 1993); *C.W. Regan, Inc. v. Parsons, Brinckerhoff, Quade & Douglas*, 411 F.2d 1379, 1388 (4th Cir. 1969); *In re Industrial Gas Antitrust Litig.*, 100 F.R.D. 280, 303 (N.D. Ill. 1983). Separate juries may decide separate issues in a controversy *only* if those issues are "so distinct and separable" from each other that separate trials may be conducted "without injustice." *Gasoline Prods.*, 283 U.S. at 500.

Pet. App. 12a. Petitioners complain that such reasoning violated *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974), because it interjected a consideration of the merits into the class certification decision. Petitioners are mistaken. *Eisen* teaches that class certification decisions should not be delayed pending resolution of potentially dispositive motions. It does not require the courts to certify classes when a class action is not "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). It is impossible to make a reasoned decision as to how efficiently to adjudicate a dispute without some inquiry into the nature of the issues presented. In any event, the court explicitly stated that it "express[ed] no views on the substantive issues in this litigation." Pet. App. 16a.

Petitioners also contend that the court of appeals eroded mandamus standards by holding that the district court order was effectively unappealable. Pet. App. 11a. They argue (Pet. 19) that the Seventh Circuit's analysis would allow virtually every class certification order to be challenged through mandamus. Petitioners grossly overstate the scope of the court of appeals' holding. This case is unusual because the class certification order does more than increase the number of plaintiffs. The order also changes the likely outcome of the litigation by invoking procedures and standards that are beyond the current legal authority of the federal courts. *See* 28 U.S.C. § 2072(b) (Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right").

Where respondents have had an opportunity to mount a full defense, they have won every case. *See supra*, note 15. The district court's certification order tipped the playing field by authorizing a class trial focused solely upon certain aspects of respondents' conduct, to be tested under a novel legal theory and a single putatively national legal standard. The district court's manifest errors im-

proved petitioners' chances of obtaining favorable findings on at least some issues at the class trial and—because such findings would not be subject to meaningful appeal —imposed extraordinary and improper pressure on respondents to settle. There is no reason for an appellate court to close its eyes to these realities.[22]

Indeed, the Seventh Circuit's conclusion—that the class certification order is effectively unappealable—is correct as a pure matter of legal procedure: The multi-stage, multi-trial structure would, in and of itself, deprive respondents of their right to a meaningful appeal. The district court has stated that, after the class trial, it would try the claims of one of the class representatives (before a second jury) and then hope that an interlocutory appeal from that trial verdict would be allowed. Pet. App. 166a. However, if the class trial produced findings in favor of petitioners but the subsequent trial of the individual petitioner's claims produced a defense verdict,[23] respondents would not have an adverse judgment to appeal. Petitioners would nevertheless no doubt attempt to utilize the unfavorable class verdict for preclusive effect

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[22] Petitioners complain (Pet. 7, 18) that the panel's reasoning is based on speculation concerning the conduct of mass tort litigation. Judges, however, are under no obligation to leave their common sense and experience at the courthouse door. Petitioners do not (and could not) challenge the accuracy of the court of appeals' understanding of the dramatic consequences of class certification as proposed by the district court.

[23] A defense verdict could result in a number of different ways. For example, a defense verdict could be returned if the district court or the jury found the individual claims of the putative class representative to be barred by the statute of limitations; the claims of at least some of the putative class representatives appear to be time-barred. A defense verdict could also result if the class representative failed to prove that his injury was caused by factor concentrate. Even if the class representative established that his injury was caused by factor concentrate, a defense verdict could result if he failed to prove that the injury resulted from the conduct of a respondent that the class jury had held to be negligent.

in state and federal courts around the country.[24] *No* appeal would be available to respondents to have the Seventh Circuit set aside the underlying class certification, let alone review the jury's determination of the hundreds of special issues presented to it. Respondents might thus be compelled to challenge the use of the class verdict in case after case both in and outside of the federal system. That alone is enough of an "irreparable injury" to merit mandamus.

In sum, the judgment of the court of appeals was correct. Moreover, it was case-specific. Petitioners' attempt to revive their unprecedented, patently erroneous, and unappealable class trial plan should be rejected.

2. Petitioners argue (Pet. 21) that the decision of the court of appeals conflicts with other appellate court decisions that have declined to issue a writ of mandamus setting aside other class certification decisions. There is no conflict. The courts of appeals evaluate each petition for mandamus—including those arising from class certification—on a case-by-case basis to determine whether it meets the standard for issuance of the writ based on the specific claims at issue and the class proposed to be certified.[25]

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[24] Obviously, respondents would contest any such effort. Res judicata, collateral estoppel, or law of the case effects of such an unprecedented class issue verdict cannot be predicted. *See generally* 7B Charles A. Wright *et al., Federal Practice & Procedure*, § 1789, at 245 (2d ed. 1986) ("[T]he court adjudicating a [class action] dispute cannot predetermine the res judicata effect of its own judgment; that can be tested only in a subsequent suit").

[25] *See, e.g., In re Diamond Shamrock Chem. Co.*, 725 F.2d 858 (2d Cir.) (applying mandamus standards to uphold class certification), *cert. denied*, 465 U.S. 1067 (1984); *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (granting mandamus to vacate certification); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (granting mandamus to vacate certification); *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993) (applying mandamus standard to uphold certification); *In re Exterior Siding & Aluminum Coil Anti-*

The cases cited by petitioners pose no conflict. For instance, in *Arthur Young & Co. v. United States District Court*, 549 F.2d 686 (9th Cir. 1977), *cert. denied*, 434 U.S. 829 (1977), the court of appeals refused to issue a writ of mandamus to vacate an order that certified an issue class and proposed a two-tier trial plan. The Ninth Circuit did not, however, hold that mandamus is never available to challenge class certification orders. Rather, the court held that petitioners were not entitled to mandamus on the facts of their case because they had failed to establish that the district court made a clear and indisputable mistake. *Id.* at 692. The court specifically rejected a Seventh Amendment claim on the ground that the issues to be determined by the second jury were distinct from those to be tried by the class jury. *Id.* at 693. In contrast, the Seventh Circuit held here that the proposed trial plan violated the Seventh Amendment because the issues to be decided at the class issue trial and subsequent individual trials were inextricably intertwined. Pet. App. 19a-20a.[26]

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trust Litig. (MDL No. 454), 696 F.2d 613 (8th Cir. 1982) (granting mandamus to vacate certification), *cert. denied*, 464 U.S. 866 (1983); *Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975) (granting mandamus to vacate certification); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976) (granting mandamus to vacate certification); *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977) (applying mandamus standard to uphold certification); *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083 (9th Cir. 1975) (granting mandamus to vacate certification), *cert. denied*, 425 U.S. 911 (1976); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1542 (11th Cir. 1987) ("Parties may also seek appellate review [of an order certifying a mandatory class] through a petition for a writ of mandamus"); *In re Temple*, 851 F.2d 1269 (11th Cir. 1988) (granting mandamus to vacate certification).

[26] *Arthur Young* is distinguishable from the present case on yet another ground. No state choice of law issues were presented; all certified claims concerned alleged violations of federal securities laws. 549 F.2d at 688-89.

Petitioners' reliance on the Tenth Circuit decision in *Copley Pharmaceutical, Inc. v. Brimmer*, No. 95-8032 (10th Cir. May 31, 1995) (Pet. App. 169a), is similarly misplaced. The court of appeals did nothing more than decline to grant mandamus on the ground that "petitioner had not demonstrated adequately that the district court has abused its discretion in granting certification." That general statement does not conflict with the Seventh Circuit's reasoning in the present case. The other cases cited by petitioners are similarly distinguishable.[27]

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[27] In *In re Sugar Antitrust Litig.*, 559 F.2d 481, 483 (9th Cir. 1977), the Ninth Circuit applied the rigorous two-part test for mandamus to the certification order, but concluded that the petitioners "had not made a threshold showing of 'clear and indisputable' error to invoke the writ." In *In re Breast Implant Litig.*, No. 92-3420/346 (6th Cir. May 22, 1992) (Pet. App. 198a), the Sixth Circuit acknowledged that mandamus could be available to challenge some class certification orders, but denied mandamus because the record in that case established the conditional nature of the certification order. *See Dante v. Dow Corning Corp.*, 143 F.R.D. 136, 138 (S.D. Ohio 1992). The Eleventh Circuit did not explain the reasons that it denied mandamus in *In re Bausch & Lomb Inc.*, No. 94-711 (11th Cir. Dec. 1, 1994) (Pet. App. 197a).

Petitioners also suggest that the present decision conflicts with decisions of the Third, Fourth, and Fifth Circuits, which upheld class certification orders on interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Pet. 22 n.21. However, the Third and Fourth Circuits permitted certification of nationwide classes only when provision was made to deal with differences of state law through a state-by-state analysis of both choice-of-law and substantive law. *See, e.g., In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986); *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993). The district court here refused to take such steps to avert an *Erie* problem. Similarly, the Fifth Circuit case cited by petitioners did not present an *Erie* issue because it arose under the law of only one state. *See Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986).

In any event, the Fifth Circuit will entertain a mandamus petition challenging a class certification order. In *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), the court issued a writ of mandamus directing the district court to vacate a certification

3. Finally, petitioners (Pet. 23) submit that the Seventh Circuit's decision will "undermine the proper relationship between trial and appellate courts." Their argument is premised on the assumption that appellate courts are eager to use mandamus to second-guess the class certification decisions of district courts.

The short answer is that petitioners have cited no mandamus stampede in response to the Seventh Circuit's decision. Further, petitioners' prediction (Pet. 19) that the Seventh Circuit will expand mandamus review in other Rule 23 cases on the basis of this decision is directly contradicted by the opinion of the court. The court of appeals pointedly stated that "[t]he set of orders in which both conditions [for issuance of the writ of mandamus] are satisfied is small. It certainly is not coterminous with the set of orders certifying suits as class actions." Pet. App. 3a.[28] If petitioners' prediction proves true, then there will be plenty of opportunity for this Court to intervene. Until then, the issues presented are best left to the lower courts.

The court of appeals acted here in response to an "extraordinary" and effectively unappealable district court decision. The Seventh Circuit recognized that the district court, while well-intentioned, sought to manage litigation using procedures and legal standards that are simply beyond the powers presently conferred on federal judges by the Constitution and statutes of the United States. The panel properly used mandamus to correct the profound, harmful, and effectively unappealable error of the district court. Petitioners ask this Court to reinstate the unconstitutional and usurpative process proposed by the district court. The Court should decline that invitation.

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order that posed a novel trial plan in violation of *Erie* and the Seventh Amendment.

[28] Significantly, this is the first and only time on record that the Seventh Circuit has issued a writ of mandamus to vacate a class certification order.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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